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RE SHARMA KUMARI SHUKLA, EX P
DATO' ABDULLAH HISHAN MOHD HASHIM (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[BANKRUPTCY NO: D2-29-3892-1999]
b 15 MAY 2000

BANKRUPTCY: *Petition - Creditor's petition - Proof of debt, act of bankruptcy and service - Whether complied with - Bankruptcy Act 1967, s. 6(2) - Affidavit verifying petition affirmed prior to presentation of petition* c *- Whether petition defective - Petitioner not present in court - Whether petition should be dismissed - Bankruptcy Rules 1969, r. 120*

The Senior Assistant Registrar ('SAR') dismissed a notice to oppose the creditor's petition herein and a summons in chambers to set the said petition aside. The SAR then granted receiving and adjudication orders in respect of d the creditor's petition. Hence, the instant appeal by the judgment debtor.

The judgment debtor argued that: (i) there should be proof of debt, the act of bankruptcy and the service of the petition at the hearing date pursuant to s. 6(2) of the Bankruptcy Act 1967 ('the Act'); (ii) that the creditor's petition e was defective because the affidavit verifying the petition was affirmed prior to the presentation of the petition; and (iii) that the creditor's petition should be dismissed as the petitioner was not present in court by virtue of r. 120 of the Bankruptcy Rules 1969 ('the Rules').

Held:

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[1] It was clear that the judgment which formed the basis of the bankruptcy proceeding was proof of the debt. The act of bankruptcy was committed on 27 December 1999 when the court dismissed the affidavit to set aside the bankruptcy notice. The service of the petition was sufficiently proven by referring to the affidavit of service. As such, there was sufficient proof g to satisfy the requirement of s. 6(2) of the Act.

[2] Section 3(1)(a) to (j) of the Act shows 10 ways by which a debtor commits an act of bankruptcy. This case fell within s. 3(1)(i) where the judgment creditor had obtained a final judgment or order.

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[3] The Rules clearly envisage the coming into being of the petition as soon as it is ready for attestation as required by r. 102. It is this act of attestation which completes the petition and makes it a creditor's petition ready for presentation under the Act after it has been duly affirmed. The affirmation of the affidavit shortly before the petition is filed but after it i

has been duly attested is permissible and well within the scope of the Act and the Rules. Thus, the attestation of the creditor's petition is what validates it. In this case, both the attestation of the petition and the affirmation of the affidavit had been done on the same day. At worst it was an irregularity which could be cured.

[4] Rule 120 of the Rules refers to instances where the petition is dismissed due to non-appearance of the creditors. In this case, the petitioner was represented by his counsel. As such, the said rule did not assist the judgment debtor.

[Appeal dismissed.]

Case(s) referred to:
Re Ho Weng Keong, ex p Market-link [1993] 1 MLJ 460 ***(refd)***
Re Lee Boon Hooi [1992] 1 AMR 214 ***(refd)***
Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd [1992] 2 MLJ 102 ***(refd)***
Re Sharif Haji Sabari [1992] 3 CLJ 1756 ***(refd)***
Sobri bin Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(a)-(j), 6(2), 131, 93(4)
Bankruptcy Rules 1969, r. 120

For the appellant/judgment debtor - Roshan Kumar; M/s Ng Yook Woon, Andrew TC Saw & Co
For the respondent/judgment creditor - Manoharan; M/s Karpal Singh & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

On 18 January 2000 the Senior Assistant Registrar (SAR) of the bankruptcy division made three orders. They were in respect of encls. 29, 37 and 39. Enclosure 29 is the creditor's petition. Enclosure 37 is a notice to oppose the creditor's petition and encl. 39 is a summons in chambers to set aside the creditor's petition. Having heard all three enclosures the learned SAR dismissed encls. 37 and 39 with costs and granted the receiving and adjudication orders with costs in respect of encl. 29. The judgment debtor appealed against all three decisions.

Findings Of The Court

I shall take all three enclosures together. Encik Roshan for the judgment debtor referred me to s. 6(2) of the Bankruptcy Act 1967 (the Act) and argued that the court should require proof of the debt, the act of bankruptcy and the service of the petition, at the hearing date. Section 6(2) of the Act reads as follows:

> 6.(2) At the hearing the court shall require proof of –
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> (a) the debt of the petitioning creditor; and
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> (b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, someone of the alleged acts of bankruptcy; and
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> (c) if the debtor does not appear, the service of the petition,
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> and if satisfied with the proof may make a receiving order in pursuance of the petition.

This argument is in my view unacceptable. It is clear that the judgment which forms the basis of this bankruptcy proceeding is the proof of the debt. The act of bankruptcy was committed on 27 December 1999 when the court dismissed the affidavit to set aside the bankruptcy notice. The service of the petition is sufficiently proven by referring to the affidavit of service (encl. 36). As such, there is sufficient proof to satisfy the requirement of s. 6(2) of the Act.

Section 3(1)(a) to (j) of the Act shows 10 ways by which a debtor commits an act of bankruptcy. The case before me falls under s. 3(1)(i) where the judgment creditor has obtained a final judgment or order.

The next ground relied on by Encik Roshan was based on the *Law and Practice on Bankruptcy* by Williams & Muir Hunter where the learned authors said at p. 56 that:

> The affidavit of verification on which the petition is filed cannot be used upon the hearing of the bankruptcy petition.

Counsel was of no help during the submission. He merely tendered a bundle of authorities and made no reference to any authority to argue his case. However, the court had to read the authorities. One of the cases put in the bundle was *Re Sharif Haji Sabari* [1992] 3 CLJ 1756 where the High Court followed the decision of another High Court in *Sobri bin Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798 which dismissed the petition on the ground that the affidavit was affirmed before the petition was presented, it

being asserted that an affidavit cannot support an unborn petition and that a petition comes to life only when presented. Drawing a parallel I gather that counsel must have intended that the creditor's petition in this case is defective because the affidavit verifying the petition was affirmed prior to the presentation of the petition.

To my mind, the law on this issue is now almost settled. In *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 another High Court refused to follow the decision in *Sobri bin Arshad*. The court held that the petition was not invalid simply because the verifying affidavit was affirmed before the petition was presented. At worst the court held that there was nothing more than a formal defect or an irregularity and that accordingly, ss. 131 and 93(4) of the Act could be invoked to cure any defects.

Section 93(4) reads as follows:

> (4) Where by this Act or by general rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as the court seems fit.

Section 131 reads as follows:

> 131. Formal defect not to invalidate proceedings.
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> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

It is interesting to note that just like the facts of the case in *Re Mohd Sharif* in respect of the case before me, the affidavit verifying was affirmed on the same day that the petition was signed. Again in *Re Ho Weng Keong, ex p Market-link* [1993] 1 MLJ 460 Lamin J (as his Lordship then was) also declined to follow the decision in *Sobri bin Ahmad*. His Lordship held that nowhere in the Act or in the Rules is it stated that the affidavit verifying the creditor's petition must be affirmed after the filing or presentation of the creditor's petition. He further held that if the Rules demand that the affidavit should be affirmed and filed only after the presentation of the creditor's petition, then it ought to have said so in the Rules. The views held by Mahadev Shankar J (as he then was) in *Re Lee Boon Hooi* [1992] 1 AMR 214 at 218 is to be noted. His Lordship said:

> *Sobri bin Arshad* [1991] 1 CLJ 1903 dealt specifically with a bankruptcy petition. The crux of this judgment is that since a bankruptcy petition has no legal existence until it is presented it can only be affirmed thereafter. I do not agree.

a With the greatest respect I would draw the kind attention of all concerned to rr. 101 and 102 of the Bankruptcy Rules. Remembering that the court file would already have been opened when the request for the bankruptcy notice was made, these rules clearly envisage the coming into being of the petition as soon as it is ready for attestation as required by r. 102. In the context of this rule that means it must be witnessed. This is usually done by the b petitioning creditors' solicitor. It is this act of attestation which completes the petition and makes it a creditor's petition ready for presentation under the Act after it has been duly affirmed.

The sequence of events provided by the Rules makes it imperative for the affidavit verifying the petition to be affirmed after the petition has been attested, c and not as in a winding-up only after it has been presented.

I am firmly of the view that the affirmation of this affidavit shortly before the petition is filed but after it has been duly attested is permissible, and well within the scope of the Act and the Rules. It is also practical, convenient and saves expense because all the required documents can be filed simultaneously d and thereafter taken at one go by the registry.

It seems to be the trend now to accept and to follow the decision in *Re Mohd Sharif*. I too am inclined to follow this decision. In fact I see the reasoning of Mahadev Shankar J as sound. The attestation of the petition is what validates it and as in this case too, both the attestation of the petition and the e affirmation of the affidavit have been done on the same day. In fact this was the identical situation in *Re Mohd Sharif* and there the court held that at worst it was irregular which could be cured.

Finally counsel for the debtor argued that the creditor's petition should be f dismissed since the petitioner was not present in court. He relied on r. 120 of the Bankruptcy Rules 1969 which provides that if any creditor neglects to appear on his petition, no subsequent petition against the same debtor or debtors or any of them either alone or jointly with any other person shall be presented by the same creditors in respect of the same act of bankruptcy g without the leave of the court. Again I do not see the force in this argument. Rule 120 refers to instances where the petition is dismissed due to non-appearance of the creditors. In the present case, the petitioner was represented by his counsel. Accordingly, it is my judgment that r. 120 does not assist the judgment debtor in this case.

h I therefore dismissed the appeals against all three enclosures with costs.

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